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No. 10-962

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IN THE

Supreme Court of the United States

ALASKA AIRLINES, INC.,

Petitioner,

—v.—

AZZA EID, AMRE R. GINENA, NAHID I. GINENA, REDA A. GINENA, SABRINA KOBERT, M. SAMIR MANSOUR, NAZMI N. NAZMI, M. MAGDY H. RASIKH, and HEBA NAZMI,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC. AND INTERNATIONAL AIR TRANSPORT ASSOCIATION IN SUPPORT OF PETITIONER

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Air Transport Association of America ("ATA") and International Air Transport Association ("IATA"), as *amici curiae*, support the Petition of Alaska Airlines, Inc. ("Alaska Airlines") for a Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Ninth Circuit.[1] The opinion of the Ninth Circuit is reproduced in the Appendix to the Petition ("Pet. App.") at 1a-71a.

INTEREST OF *AMICI CURIAE*

ATA is a non-governmental trade association founded in 1936 and represents the leading U.S. airlines. IATA is a non-governmental international organization founded in 1945 by air carriers engaged in international air services and consists of more than 250 Member airlines from 136 countries.

ATA and IATA, as representatives of their Member airlines, have a direct and substantial interest in the critical aviation safety and security issues before the Court. As the representatives of the world's leading airlines, ATA and IATA are in the unique position to explain the global importance and effect of the decision below on aviation

[1] Pursuant to Sup Ct R 37 2, *amici curiae* certify that counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief, and the parties have consented to the filing of this brief in correspondence on file with the Clerk's office Pursuant to Sup Ct R 37 6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

safety in general and on their hundreds of Member airlines, and the millions of passengers they carry, in particular.

Both ATA and IATA seek to promote safe, regular and economical air transport, and are involved in the development of aviation law and policy. IATA participated in the drafting of the Tokyo Convention[2] (as it has in the drafting of every recent ICAO international air law convention) and ATA urged ratification, based on their belief that it would afford safety and security benefits to passengers, flight and cabin crews, and the owners and operators of aircraft. *See* Convention on Offenses Committed on Board Aircraft: Executive Report No. 3: Hearings Before the United States Senate Committee on Foreign Relations, 91st Cong., 1st Sess. (May 8, 1969), at 32-33.

A proper interpretation of the Tokyo Convention is essential to safe and orderly civil aviation, especially in light of the enhanced security concerns since the tragic events of September 11, 2001 and the

> increase of the number and gravity of reported incidents involving unruly or disruptive passengers on board civil aircraft; . . . the implications of these incidents for the safety of the aircraft and the passengers and crew on board these aircraft; [and]. . . the special environment of aircraft in flight and inherent risks connected therewith. . . .

[2] Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (1969) (Pet. App. at 97a-111a).

ICAO Assembly Resolution A33-4 (33rd Sess., Montreal, 25 September – 5 October 2001).

For ATA, IATA and their Member airlines, the Majority Opinion has both immediate and long-term operational and safety consequences. Moreover, as the first reported appellate court decision in the world to address the Captain's authority to act under the Tokyo Convention when faced with a potential threat to safety of the aircraft or good order/discipline on board, the Majority Opinion will be looked to by courts across the globe for guidance and instruction when courts interpret the Convention. Thus, the Majority Opinion must be reviewed to avoid the risk of detracting from aviation safety around the world.

Accordingly, ATA and IATA have a substantial interest on behalf of their Members to ensure a proper and uniform interpretation of the Tokyo Convention that is consistent with the Convention's language and goals, and the drafters' intent, to ensure aviation security and safety.

REASONS FOR GRANTING THE PETITION

Passengers on aircraft place not just their personal safety, but their lives, in the hands of the flight crew. As explained by the Petition, this case presents an important question of treaty interpretation involving a matter increasingly faced by aircraft Captains while in flight—whether a Captain's decision to take action as foreseen by the Tokyo Convention to protect the safety of the aircraft while in flight and its occupants or to maintain good order and discipline on board the aircraft is afforded deference. The Tokyo Con-

vention sought to protect the traveling public by granting the Captain the power to act when faced with a potential threat during flight. The Majority Opinion, if allowed to stand, would lead to aircraft Captains—who have primary responsibility for the safety of all onboard—debating their decisions in situations where hesitation could lead to tragic and irreversible consequences. The Majority Opinion in this case misinterprets a carefully balanced international standard that stands for the proposition that the Captain be authorized to use his own judgment regarding the identification of and response to potential threats to the safe operation of the flight and to respond without fear that his judgment will be second-guessed after the fact in the neutral environment of a federal courthouse.

The Captain's decision to exercise this authority necessarily must be reviewed with great deference. The Majority Opinion disagreed, however, and incorrectly interpreted the Tokyo Convention as:

1. not affording any deference to the Captain's decision to take action in response to conduct that may jeopardize the safety or good order and discipline on board the aircraft; and

2. requiring the Captain to conduct an independent investigation before taking action in response to a potential threat, rather than relying on the flight attendant's statements (in this case that she had "lost control" of the first class cabin).

Pet. App. at 14a-19a, 21a-24a, 27a-29a.

In so doing, the Majority Opinion needlessly creates a conflict with the Tokyo Convention's purpose and drafters' intent, and the express view of the United States, as well as a conflict among the Circuits as to the interpretation of 49 U.S.C. § 44902, the corresponding U.S. law governing domestic flights, which gives air carriers broad discretion to refuse passage to persons for safety reasons. The Petition should be granted because the Majority Opinion will have significant adverse safety ramifications in the real world beyond the facts of this case. As the dissent correctly recognized:

> the unintended but probable consequence of the standard my colleagues adopt for judging the in-flight conduct of a pilot under the Tokyo Convention is risk to passenger and crew safety—an affront to the principal purpose of the Tokyo Convention. The majority misinterprets the standard and examines facts in hindsight that were unknown to the captain at the time of the event, ...

Pet. App. at 37a-38a [footnote omitted].

I

THE NINTH CIRCUIT'S INCORRECT INTERPRETATION OF THE TOKYO CONVENTION WILL ADVERSELY AFFECT AVIATION SAFETY, AN ISSUE OF CRITICAL IMPORTANCE

The problem created by the Majority Opinion is more far reaching than whether the plaintiffs in this action should be entitled to recover against Alaska Airlines. The decision limits the Captain's authority to react to a wide range of possible disturbances and dangers that may arise on board an aircraft, including incidents of terrorism and air piracy, which significantly impacts the safety of transportation by air. Moreover, the decision may have a substantial impact on foreign courts' interpretation of the Tokyo Convention, rendering its likely impact global in nature.

Even before the events of 9/11, the Court recognized an "observable national and international hijacking crisis," and that "the Government ha[s] a compelling interest in preventing [this] otherwise pervasive societal problem. . ." *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989). Thus, as the Court recently stated "[e]veryone agrees that the Government's interest in combating terrorism is an urgent objective of the highest order." *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010). Of course, the aircraft commander directly faces these risks and is on the front line combating terrorism while in flight.

The Tokyo Convention was developed at a time when there was substantial concern over an

increase in passenger incidents, including hijacking, that threatened safety during travel by air, and the safety of aviation was the principal objective of the Convention. *See* S. Rep. No. 91-1083, 1970 U.S.C.C.A.N. at 3997 (Aug. 10, 1970); Pet. App. at 115a; Gerald F. FitzGerald, *The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft*, 1 Can. Y.B. Int'l L. 230, 230, 240-41 & n.24, 244 n.29 (1963). The threat of terrorism to aviation is even greater today than it was when the Tokyo Convention was drafted, as the threat is always evolving and terrorist tactics are becoming more sophisticated in an effort to circumvent airline security measures. As the FAA has warned, any passenger disturbance or commotion, even one that appears to be minor or harmless, must be taken seriously and considered suspicious because it could be a diversion for more serious acts such as obtaining access to the flight deck or gathering intelligence on the carrier's security responses and vulnerabilities for use at a later time (*e.g.*, the 9/11 terrorist dry-runs, the recent shipments of packages from Yemen to Chicago). *See* Federal Aviation Administration, *Fact Sheet—Aircraft Security Accomplishments Since Sept. 11*, September 5, 2002, http://www.faa.gov/news/fact_sheets/news_story.cfm?newsID=6239. For this reason, governmental authorities and the aviation industry need to be vigilant and their response immediate and flexible.[3]

[3] In recognition of the evolving risks and under the auspices of ICAO, two counterterrorism treaties devoted to improving aviation security were adopted in Beijing, China in September 2010, which stress the State Parties' concerns over the "new types of threats against civil aviation

The Tokyo Convention is the cornerstone of the law regarding action taken in response to the myriad threats that may arise during a flight, and compels uniform recognition of the Captain's authority to act in response to these threats. The primary means by which the Tokyo Convention sought to achieve its security and safety goals was to grant the "aircraft commander," who is the ultimate authority on the aircraft while in flight, broad authority to take necessary action in response to acts on board the aircraft that may jeopardize the safety of the aircraft/persons therein or the good order and discipline on board. *See* Tokyo Convention, Articles 6, 8 and 9; *see also* FitzGerald, *supra*, at 232-33. A broad immunity provision was included in the Convention (Article 10) to ensure swift and decisive action to preserve the safety of the aircraft and its passengers. *Id.* at 247 (absent immunity, "[t]he aircraft commander, crew members and others would be reluctant to act against persons prejudicing safety, good order and discipline"); I *International Conference on Air Law,* Tokyo, August-September 1963, ICAO Doc 8565-LC.152-1, Minutes at 223 ("*Minutes*") (without an explicit immunity provision, "the aircraft commander might have to hesitate and might, per-

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requir[ing] new concerted efforts and policies of cooperation on the part of the States " *See* Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, *opened for signature* Sept 10, 2010, http //www.icao.int/DCAS2010/restr/docs/beijing_convention_multi.pdf (not yet in force), Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Sept. 10, 2010, http.//www.icao.int/DCAS2010/restr/docs/beijing_protocol_multi.pdf (not yet in force). These treaties were strongly supported and signed by the U.S., but have not yet been ratified

haps, do nothing in circumstances in which he should have acted."). As the United States recognized in the *Amicus* Brief presented to the Ninth Circuit: "[g]iven the breadth of discretion afforded the aircraft captain and the purpose of the Convention's grant of immunity, review of actions taken by a captain pursuant to the Tokyo Convention must be *highly deferential*." Pet. App. at 122a (emphasis added). A deferential standard also is consistent with 49 U.S.C. §44902, the corresponding U.S. law governing domestic flights, and 49 U.S.C. § 44941, which provides immunity for reporting suspicious activities in air transportation absent knowing falsity or recklessness.

Rather than uphold the central goal of safety of the Tokyo Convention's drafters and follow the views of the United States, the Majority Opinion charted an opposite course that is inimical to the Tokyo Convention and the position of the United States. If allowed to stand, the Majority Opinion will inhibit safety in two ways: (1) by failing to give any deference to actions taken by the Captain in response to a potential threat, which may lead to delay or inaction due to fear of potential criminal and/or civil liability in the event his or her determination later is proven incorrect, and (2) by adding a requirement found nowhere in the language of the Convention that the Captain engage in an independent investigation of a disturbance before taking action, thereby interfering with a timely response and placing the Captain, who may not leave the cockpit and is primarily focused on operating the aircraft safely, in a difficult, if not impossible, position.

The treaty question presented herein is significant and critical, and requires immediate review by the Court, as waiting for the issue to percolate or for other Circuit Courts of Appeal to address the error of the Majority Opinion could have serious safety consequences.

A. The Ninth Circuit's Failure To Give Deference To The Decision Of The Captain Is Contrary To The Tokyo Convention's Goals And The Parties' Intent

The Majority Opinion's failure to give any deference to the Captain's decision necessarily results in a negligence-based "reasonableness" standard to determine whether the Captain had "reasonable grounds to believe" a passenger was about to commit (1) an "act which may jeopardize the safety of the aircraft or of persons or property therein" or "the good order and discipline on board" or (2) "offences against penal law." *See* Tokyo Convention, Articles 1, 6, 8 and 9. This is contrary to the goals and drafting history of the Tokyo Convention, the position taken by the United States below and the decision of the only Sister Signatory to address this issue. It also conflicts with courts' consistent interpretation of 49 U.S.C. § 44902.

1. The Conflict with the Drafting History. While the drafters of the Tokyo Convention were mindful of the interests of passengers, the safety of aviation was the principal objective of the Convention. *See* 1970 U.S.C.C.A.N. at 3997; Pet. App. at 115a. To achieve the safety objective, the "Convention makes more certain the powers and authority of an aircraft commander and estab-

lishes a uniform international standard for judging the actions of the commander." 1970 U.S.C.C.A.N. at 3997. Thus, the Convention was deliberately drafted not only to bestow broad authority, but also to confer considerable discretion, to the Captain as to whether, when, and how to act. *See* Sen. Exec. Rpt. 90-L, at III-IV, VI (Sept. 25, 1968); *see* R. Boyle & R. Pulsifer, *The Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 30 J. Air L. & Comm. 305, 328-29 (1964).

The reason for conferring these powers and discretion to the Captain was recognition of the Captain's special responsibility and the unique environment in which he operates. As explained by the U.S. delegate:

> the aircraft commander was in a special position: The doors were closed and he did not have the local police force immediately available. Hence, if a passenger endangered the life or safety of another passenger or threatened the safety of the aircraft, the aircraft commander and his crew should be authorized to take whatever immediate action was necessary.

Minutes at 166; *see also Minutes* at 168 (French Delegate: "The justification for the powers given to the aircraft commander was that the aircraft constituted a closed universe which was isolated from the external world and from the influence of authorities that were normally competent to act.").

Moreover, the drafters recognized that a Captain's decisions would often require immediate action based on incomplete facts:

> He would be exercising the additional powers concerned in the interest of the small community traveling with him in the aircraft. While [the aircraft commander] would be comparable to the captain of a ship, he would have to deal with situations that might be more urgent. . . .
>
> * * *
>
> The Conference should give some guidance to the aircraft commander who was given powers in the general interest. If nothing were included in the Convention on the point under discussion, the aircraft commander might have to hesitate and might, perhaps, do nothing in circumstances in which he should have acted.

Minutes at 223; *see also Minutes* at 166, 177-79, 223.

Thus, to allow the Captain to act without hesitation and fear of subsequent retaliation through civil suit or otherwise, Article 10 confers immunity to him and others for actions taken in accordance with the Convention. "This immunity should enhance the proper attitudes and actions necessary to significantly contribute to safety of flight in international aviation." 1970 U.S.C.C.A.N. at 3998.

By improperly equating "reasonable grounds" with a negligence-type "reasonable person" standard of care not reflecting the deference the

drafters clearly intended to afford the Captain's actions, the Majority Opinion fails to recognize the Captain's unique position and special responsibility for the security and safety of all on board as well as those on the ground. In fact, the drafters of the Convention specifically rejected a fault-based standard. *See Minutes* at 219-23; *see also Minutes* at 222 ("introducing the rather difficult concept of '*faute*' [fault]. . . did not seem to be very appropriate to apply to the kind of error which the aircraft commander might make under various articles. . . .").

In light of the discretion due to the actions of the Captain and the rejection of a fault-based standard for review of those actions, Petitioner and Amici ATA, IATA and ALPA advocated that in the exercise of the powers conferred by the Tokyo Convention, the Captain should be entitled to immunity unless the Captain acted in an "arbitrary and capricious" manner. Such a standard strikes a proper balance between the goal of safety and the interests of the passengers by giving effect to the discretion the drafters conferred upon the Captain without conferring blanket immunity, and is consistent with how U.S. courts have reviewed actions taken under domestic legislation that is the counterpart to the Tokyo Convention (49 U.S.C. § 44902) for the last 35 years.

The Majority rejected the relevance of this deferential standard, stating that "the treaty and its drafting history say nothing about 'arbitrary and capricious'" and that such a standard is "normally applied to actions of government agencies or judicial officers; it is seldom used to judge the conduct of individuals in the real world." Pet. App. at 14a,

18a. These conclusions are incorrect, unjustified and dangerous.

The U.S. delegate specifically referred to an "arbitrary and capricious" standard during the negotiation of the Convention:

> Within the general concept of United States law, the phrase "reasonable grounds" would give the impression that the aircraft commander would be required to have a substantial basis for his belief, that he could not act on the basis of facts which were inadequate to support his belief to the effect that a person had committed or was about to commit the kind of act under consideration. ***In other words, the aircraft commander could not act arbitrarily or capriciously.***

Minutes at 155 (emphasis added). The Majority Opinion omits the final sentence. Pet. App. at 15a-16a. *See also* Sen. Exec. Rpt. 90-L, Article-by-Article Analysis at 8 (referencing "arbitrary and capricious" as the standard by which to assess conduct under Article 9).

Moreover, the drafters' subsequent discussion of the term "reasonable grounds" and the extent of immunity further reflects the drafters' understanding that the Captain's actions were meant to be assessed by a deferential standard akin to the arbitrary and capricious standard typically applied to governmental action. *See Minutes* at 174 (aircraft commander could not "exercise his powers in an ***arbitrary*** way"); *Minutes* at 221-22, 226-27 (immunity allowed unless the commander "**acted maliciously**" or "**intentionally abused**

his powers or if he was guilty of serious negligence.") (emphasis added).

The Majority Opinion also ignored the extensive drafting history when it rejected the deferential arbitrary and capricious standard as a standard that is "normally applied to actions of government agencies or judicial officers; [and] it is seldom used to judge the conduct of individuals in the real world." Pet. App. at 18a. The drafters made clear that the Captain was not to be considered like other individuals in the real world and recognized that the Captain operates in a constrained environment with responsibilities and corresponding authority far beyond those of an ordinary individual.

Just as the Majority Opinion recognized that the Captain is the "officer charged with enforcing" 49 U.S.C. § 46504[4] (Pet. App. at 26a-27a), the drafters recognized that, while the Convention did not intend to convert the Commander into a police officer, the Commander was conferred with certain quasi-official police powers and authorized by the Treaty to invoke those powers and, therefore, should be accorded immunity in doing so. *See Minutes* at 197 (U.S. delegate noting importance of granting uniform immunity as afforded police officers in various states); *Minutes* at 154 (it is

[4] Under 49 U.S.C § 46504, it is a criminal offense (punishable by fine and/or imprisonment up to 20 years) for a person to assault or intimidate a member of the flight crew in any way which interferes with his or her ability to perform his or her duties *See also* 14 C F R § 121.580 ("No person may assault, threaten, intimidate, or interfere with a crewmember in the performance of the crewmember's duties aboard an aircraft being operated under this part ")

"understood that Articles 5 to 9 referred to the powers of the aircraft commander and other persons. The aircraft commander was considered to be a public official"); *Minutes* at 160 (the Convention "gave certain police powers to the aircraft commander"); *Minutes* at 163 ("Article 5(2) dealt with the grant of the power to perform certain acts of a police nature"); *Minutes* at 304 ("What the Conference was seeking to do in the Convention was to invest in the aircraft commander and, in a subsidiary manner, in the other crew members a quasi-police power."); *Minutes* at 313 ("a certain kind of power of police officer was conferred upon the aircraft commander").

In light of the special power conferred, it is not only logical, but imperative, that the acts of the Captain be afforded the same degree of deference given to actions of governmental agencies or officials, which is exactly what was intended by the drafters. *Cf.* 49 U.S.C. § 44921(h) (immunity to pilots appointed as federal flight deck officers for actions taken absent "gross negligence or willful misconduct").

2. The Conflict with the United States' Position. The Majority Opinion also ignores the clear and unequivocal position taken by the United States as *amicus curiae*, which "is entitled to great weight,"[5] that the Captain's exercise of authority under the Tokyo Convention is to be reviewed with great deference. Pet. App. at 122a, 125a-126a, 130a.

[5] *Abbott v. Abbott*, 130 S Ct. 1983, 1993 (2010)

3. The Conflict with the Decision of a Sister Signatory. As with its analysis of the Convention's drafting history, the Majority Opinion's review of the opinion issued in *Zikry v. Air Canada*, Civil File No. 1716/05 (Haifa Magistrate Ct. Nov. 9, 2006) (Judge Tubi) (Israel) by the Israeli Magistrates Court of Haifa—the court of a sister signatory (Israel)—simply ignored essential language that contradicts the Majority Opinion's interpretation. As this Court has stated, in interpreting international treaties "'[t]he "opinions of our sister signatories" . . . are "entitled to considerable weight."'" *Abbott*, 130 S. Ct. at 1993 (quoting *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 176 (1999)). In *Zikry*, the court rejected a standard similar to the one adopted by the Ninth Circuit in favor of one giving the Captain substantial deference. The court specifically noted that the Tokyo Convention confers "extensive and wide authority" upon the Captain. *See Zikry*, ¶ 16.1. The Majority Opinion's brief discussion of *Zikry* omitted this aspect of the Israeli court's decision, and in so doing failed to give it the considerable weight to which it is entitled, especially in light of the fact that it was consistent with the views of the United States.

The Majority Opinion's application of a non-deferential, negligence-based standard to review the Captain's actions with the luxury of information developed in hindsight is incorrect and inimical to aviation safety and, accordingly, this issue is of substantial importance and warrants immediate review by the Court.

B. The Ninth Circuit's Imposition On The Captain Of An Obligation To Investigate Conflicts With The Tokyo Convention's Goals And The Parties' Intent

The Majority Opinion further thwarts the Convention's goals and drafters' intent by imposing an independent duty to investigate upon the Captain, who, according to the Majority Opinion, is not entitled to rely on what he is told by the flight crew. The duty to investigate imposed by the Majority Opinion is clearly contrary to the intention of the drafters, the express position of the U.S. amicus and existing federal law.

In determining whether the Captain's actions in this case met the "reasonableness" standard, the Majority Opinion focused on the events as alleged by plaintiffs, including facts that were not and could not have been known to the Captain at the time of his actions. As the dissent correctly noted, however, the issue is whether the Captain had "reasonable grounds to believe. . . ," and so his perception is the only one that is relevant—"hindsight and second-guessing have no place in the analysis." Pet. App. 45a, 66a. *accord Cordero v. CIA Mexicana de Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982); *Cerqueira v. American Airlines, Inc.*, 520 F.3d 1, 14-16 (1st Cir. 2008); *Williams v. Trans World Airlines*, 509 F.2d 942, 948 (2d Cir. 1975). Unlike the Majority Opinion, the dissenting opinion is in accord with the Convention's language and the parties' intent.

The Tokyo Convention authorizes the Captain to act not only when an act has been committed but when there is a potential threat:

- Article 1(1)(b): The Convention applies to acts that "may" jeopardize the safety of the aircraft or the persons therein.
- Articles 6(1) and 8(1): The Captain may act when he has reasonable grounds to believe that a person "is about to commit" an act that jeopardizes the safety of the aircraft or the persons therein or the good order and discipline on board.

By these provisions, the drafters authorized action even when there were no "concrete facts or preparatory facts" and recognized that the Captain must often make a quick decision to act based on limited information. *See Minutes* at 166, 177-79, 223. Thus, "the Convention permits a captain to rely on his reasonable judgment, without searching out 'concrete' facts on which to base that judgment." Pet App. at 126a.

As the United States further explained in its amicus brief, "the pilot must therefore be able to rely on the reports of the cabin crew and keep their attention focused on flying the plane." Pet. App. at 131a; *see also* Pet. App. at 129a-130a. Thus, a court's review under the Tokyo Convention should be limited to the facts known to the Captain, much as the existence of "'reasonable grounds'" under federal arrest statutes depends only on "'the facts and circumstances known to the officer. . . .'" Pet. App. at 130a (*quoting Henry v. United States*, 361 U.S. 98, 102 (1959)).

The Israeli court in *Zikry* likewise found that the facts should not be considered with hindsight, "but at the time of the actual event" and that it did not matter if "*post factum*" the captain's

beliefs are proven false (*Zikry* at ¶¶ 8, 15). Similarly, U.S. courts applying 49 U.S.C. § 44902(b) have understood that because of the nature of air transportation, the pilot's decision to take action would have to rest on something less than perfect knowledge and absolute certainty and, therefore, the Captain is entitled to rely upon a flight attendant's representations, and is not required to conduct an independent investigation. *See Cerqueira*, 520 F.3d at 15; *Cordero*, 681 F.2d at 672; *Williams*, 509 F.2d at 948; *Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 397-98 (S.D.N.Y. 2004); *Christel v. AMR Corp.*, 222 F. Supp. 2d 335, 340 (E.D.N.Y. 2002); *see also* Pet. App. at 126a-133a.

Thus, the Majority Opinion's finding that the flight crew could not rely on cabin crew reports, but should have conducted an independent investigation before acting (*e.g.*, asked questions and/or looked through the cockpit door portal to see what was going on in the cabin) (Pet. App. at 21a-22a), is contrary to the structure and goals of the Convention as well as the views expressed by the United States. Most importantly, as the United States cautioned, "FAA regulations make it difficult, if not impossible, for a captain to personally investigate potential disturbances in the passenger cabin," and "the Convention contemplates that any investigation will be done by competent authorities who, unlike pilots, are trained to investigate such incidents and sort out competing stories." Pet. App. at 131a-132a.

The Majority Opinion will inhibit the Captain's ability to act in an emergency situation, and transportation by air will be more dangerous as a result—which is exactly what the Tokyo Conven-

tion sought to avoid. With the enormous potential danger associated with transportation by air having been so vividly demonstrated less than one decade ago, the Ninth Circuit's decision warrants immediate review by the Court.

II

THE NINTH CIRCUIT OPINION CREATES DISUNITY BETWEEN DOMESTIC AND INTERNATIONAL LAW AND A CONFLICT AMONG THE CIRCUITS

Review also is warranted because the Majority Opinion creates disunity between U.S. domestic and international law, and a direct conflict among the Circuits.

The Majority Opinion correctly recognized that the interpretation of 49 U.S.C. § 44902, which provides that an air carrier "may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety," is relevant to a proper interpretation of the Tokyo Convention, but then opted to reject the established precedent that an air carrier's decision to refuse transport under § 44902(b) is not subject to liability unless the decision is arbitrary or capricious.

The Majority recognized that their interpretation of § 44902(b) is in conflict with the First Circuit's decision in *Cerqueira*, 520 F.3d 1, but held that their interpretation of the Tokyo Convention "is consistent with the [Ninth Circuit's] cases applying the analogous statute for domestic air travel, 49 U.S.C. § 44902." Pet. App. at 17a-19a. The Majority Opinion's holding, however, is

directly contrary to previous interpretations of § 44902(b) by the Ninth Circuit itself as well as those of the First, Second and Fourth Circuits:

Ninth Circuit

- *Cordero v. CIA Mexicana de Aviacion, S.A.*, 681 F.2d at 671-72 and n.4, expressly adopted the "arbitrary and capricious" test set forth by the Second Circuit in *Williams*, 509 F.2d at 948, and held that the district court had "properly instructed the jury in the precise language of the *Williams* test."
- *Shaffy v. United Airlines, Inc.*, 360 Fed. Appx. 729, 730, 2009 WL 4882662, at *1 (9th Cir. Dec. 10, 2009), following *Cordero* and holding that "[t]he test for whether a refusal to transport is permissible 'rests upon the facts and circumstances of the case as known to the airline at the time it formed its opinions and made its decision and whether or not the opinion and decision were rational and reasonable and not capricious or arbitrary.'"

First Circuit

- *Cerqueira v. American Airlines, Inc.*, 520 F.3d at 14, agreed "with *Williams* and [held] that an air carrier's decisions to refuse transport under § 44902(b) are not subject to liability unless the decision is arbitrary or capricious."

Second Circuit

- *Williams v. Trans World Airlines*, 509 F.2d at 948, found that "[t]he test of whether or not the airline properly exercised its power under s 1511 [the predecessor to § 44902(b)] to refuse passage to an applicant or ticket-holder rests

upon the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision and whether or not the opinion and decision were rational and reasonable and not capricious or arbitrary in the light of those facts and circumstances. They are not to be tested by other facts later disclosed by hindsight."

Fourth Circuit

- *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998), holding that "[p]ursuant to 49 U.S.C. § 44902(b), airlines must be accorded broad discretion in making boarding decisions related to safety. Allowing [plaintiff's] claim to proceed would frustrate this important federal objective. Airlines might hesitate to refuse passage in cases of potential danger for fear of state law contract actions claiming refusal to transport."

The Ninth Circuit had followed *Williams* and applied an arbitrary and capricious standard under 49 U.S.C. § 44902 until its decision below, which created a conflict not only with the prior Ninth Circuit cases, but also with case law of the First, Second and Fourth Circuits and numerous district courts.[6] Pursuant to the standard set forth

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[6] *See, e.g., Hammond v. Northwest Airlines*, No. 09-12331, 2010 WL 2836899, at *4 (E.D. Mich., Jul. 19, 2010), *Atia v. Delta Airlines, Inc.*, 692 F. Supp. 2d 693, 701 (E.D. Ky. 2010), *Ruta*, 322 F. Supp. 2d at 397-98; *Al-Qudhai'een v. America West Airlines, Inc.*, 267 F. Supp. 2d 841, 847-48 (S.D. Ohio 2003), *Dasrath v. Continental Airlines, Inc.*, 228 F. Supp. 2d 531, 538-39 (D.N.J. 2002), *Christel*, 222 F. Supp. 2d at 340-41.

by the Majority Opinion, if an airline is confronted by an unruly passenger incident on the ground, where law enforcement is available and safety issues have far less consequence, the Captain's response will be judged on the facts as they appeared at the time, but if the same situation arises in flight, the Captain is required to conduct an investigation before responding to avoid after-the-fact second-guessing. Moreover, the Majority Opinion's adoption of a non-deferential fault-based standard under the Tokyo Convention creates a conflict between the law to be applied to international flights governed by the Convention and the standard applied by courts outside the Ninth Circuit to domestic flights governed by 49 U.S.C. § 44902.

It is unrealistic to expect the Captain to know whether the route he is operating at the time a disturbance or emergency arises is governed by a deferential or non-deferential standard with regard to a later review of his actions. *See Minutes* at 181-84, 188, 193, 195, 214-15, 223, 311 (noting that the Captain was not a lawyer, and should not be expected to know the laws of the various States). Accordingly, in an effort to avoid potential liability, airlines will base their policies, procedures and training for all flights on the non-deferential standard applied by the Ninth Circuit, which will adversely impact the safety of air transportation throughout the world.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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